

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

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In the matter of :
THE E.W. SCRIPPS COMPANY, : Index No. _____
Petitioner, :
For a Judgment Pursuant to Article 78 :
of the Civil Practice Law and Rules :
: **VERIFIED PETITION**
-v- :
NEW YORK CITY POLICE DEPARTMENT and :
JAMES P. O'NEILL, in his official capacity as :
Commissioner of the New York City Police :
Department, :
Respondents. :
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TO THE SUPREME COURT OF THE STATE OF NEW YORK:

The E.W. Scripps Company ("Scripps" or "Petitioner"), by and through its undersigned counsel, respectfully alleges as follows:

1. This is a special proceeding brought against the New York City Police Department ("the NYPD") and its Commissioner James P. O'Neill (collectively, "Respondents") pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR"), the Freedom of Information Law, Public Officers Law §§ 84, *et seq.* ("FOIL") and CPLR § 3001.

2. This proceeding arises out of the NYPD's failure to provide certain information to Petitioner as required by FOIL.

JURISDICTION AND VENUE

3. Petitioner Scripps is an Ohio Corporation with its principal place of business at 312 Walnut Street, Suite 2800, Cincinnati, OH 45202. Petitioner owns and operates television and radio stations across the country.

4. Respondent New York City Police Department is a law enforcement agency administered under Title 14 of the New York City Administrative Code and is an “agency” within the meaning of Public Officers Law § 86(3). Its principal office is located at 1 Police Plaza, New York, NY, 10038.

5. Respondent James P. O’Neill is a public officer who is named in his official capacity as the Commissioner of the NYPD.

6. The actions of Respondents that form the basis of this Petition are final in nature and cannot adequately be reviewed by another court, entity or officer. As set forth further below, Petitioner submitted a FOIL request to the NYPD on September 7, 2017, which the NYPD denied on January 9, 2018. Petitioner timely submitted an administrative appeal, which the NYPD denied on January 30, 2018.

7. Petitioner has now exhausted its administrative remedies, and this Court thus has jurisdiction over this matter pursuant to Public Officers Law § 89(4)(b), CPLR Article 78, and CPLR § 3001.

8. This proceeding is commenced in New York County pursuant to CPLR § 506(b) and CPLR § 7804(b) because it is where Respondents’ principal office is located and because it is within the judicial district wherein Respondents made the determinations petitioned against and complained of and where they refused to perform the duties specifically enjoined upon them by law.

FACTS

Background

9. Scripps is a national media company that owns and operates local television and radio stations across the United States. Scripps also operates an award-winning investigative reporting newsroom from Washington, DC, known as the Scripps News Washington Bureau. Among other things, the Bureau reports investigative stories online and on Scripps-owned television stations.

10. The Bureau is currently conducting an investigative research project regarding reported crime statistics in jurisdictions around the country. The project's chief aim is to analyze the rate at which law enforcement agencies successfully address reported crimes.

11. In conducting its research, Scripps has relied on data about reported crimes that law enforcement agencies provide to the Federal Bureau of Investigation (FBI) through the Uniform Crime Reporting (UCR) Program. *See* FBI, Crime in the United States, 2016: About the Uniform Crime Reporting (UCR) Program (Fall 2017), <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/resource-pages/about-ucr.pdf>. Law enforcement agencies participate in the UCR Program either through the Summary Reporting System (SRS), or the National Incident-Based Reporting System (NIBRS). *See id.*

12. As relevant here, the difference between these reporting systems is the degree of detail the law enforcement agency provides. Under SRS, an agency provides only summary-level data to the FBI, with aggregate numbers for the relevant categories of data (e.g., the total number of burglaries reported). *See* FBI, Criminal Justice Information Services (CJIS) Division Uniform Crime Reporting (UCR) Program:

Summary Reporting System (SRS) User Manual (June 20, 2013),
<https://ucr.fbi.gov/nibrs/summary-reporting-system-srs-user-manual>. Agencies participating in SRS provide data mainly for serious crimes, known as Part I offenses, such as murder, rape, robbery, and aggravated assault. *See id.* at 20-21. Under NIBRS, in contrast, an agency provides “incident-level” data for each reported incident of crime (e.g., the date and place of every burglary reported). *See UCR Program Data Collections*, FBI (last visited May 30, 2018), <https://ucr.fbi.gov/ucr-program-data-collections>. Roughly two-thirds of law enforcement agencies – including the NYPD – participate in SRS, and the remaining one-third participate in NIBRS. *See 2016 NIBRS Crime Data Released*, FBI (Dec. 11, 2017), <https://www.fbi.gov/news/stories/2016-nibrs-data-released>.

13. Importantly, and notwithstanding the above, even agencies that participate in SRS generally maintain their own records with incident-level data for reported crimes. The summary-level figures the agencies report to the FBI is based on this incident-level data.

14. As noted, the focus of Scripps’ research is the degree of law enforcement agencies’ success in addressing incidents of reported crime. That success is reflected in the rate at which agencies “clear” reported offenses. *See FBI, Crime in the United States, 2016: Offenses Cleared* (Fall 2017), <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/clearances.pdf>. In the UCR program, an offense can be cleared in one of two ways: by arrest, or by “exceptional means.” *Id.* at 1. An offense might be exceptionally cleared when, for example, the offender dies or the victim refuses to cooperate with law enforcement. *Id.* at 1-2.

15. Scripps' research also takes into account the rate at which law enforcement agencies report offenses as "unfounded," that is, based on false or baseless complaints. When an agency determines that a complaint was unfounded, it removes that offense from the total crime tally in its UCR report. *See* FBI, Crime in the United States, 2010: Methodology (Sept. 2011) at 2-3, <https://ucr.fbi.gov/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/methodology.pdf>.

16. Like other agencies that participate in SRS, the NYPD reports to the FBI – and discloses to the public – data about cleared and unfounded offenses on an aggregate basis (*i.e.*, the total number of complaints cleared or unfounded). But summary-level data provides only a limited window into the actual success of law enforcement in addressing reported incidents of crime. For example, academic studies have found that agencies can manipulate their overall clearance rate by various means, including not recording some criminal complaints or over-clearing cases as "exceptional."¹ Some manipulation has also been exposed by journalism. In the late 1990s, for instance, *The Philadelphia Inquirer* reported – with the assistance of documents obtained under the Freedom of Information Act – that the Philadelphia Police Department deliberately miscategorized reported rapes in order to maintain artificially low crime statistics.² In

¹ See, e.g., Robert D. Austin, Measuring and Managing Performance in Organizations 13-14 (1996) (citing academic studies finding that clearance rates are "easily inflated by not recording some citizens' complaints, or by waiting to post them until the crime has been solved"); Marc Reidel & John G. Boulahanis, *Homicides Exceptionally Cleared and Cleared by Arrest*, 11 Homicide Studies 151, 162 (2007) (finding that "the practice of including exceptional clearances in total clearances leads to an inflation of clearance percentages, particularly where there are a large number of exceptional clearances").

² Mark Fazlollah, Michael Matza, Craig R. McCoy, & Clea Benson, *Women victimized twice in police game of numbers*, The Philadelphia Inquirer (Oct. 17, 1999), <http://inquirer.philly.com/packages/crime/html/sch101799.asp>.

short, without access to the incident-level data underlying summary-level statistics of reported crime, meaningful assessment of the accuracy of those statistics is difficult, if not impossible.

17. In connection with its investigative research, Scripps has requested and obtained such incident-level data from over forty law enforcement agencies in the United States, almost always without delay or substantial cost. This includes numerous police departments that participate in SRS, including two in the state of New York. Though the information these agencies provide varies in its precise format and content, it almost always contains data revealing whether or not individual offenses were cleared by arrest, through exceptional means, or unfounded. The data received from law enforcement in Chicago, Los Angeles, Buffalo, and Suffolk County (New York) are illustrative examples. (A true and correct copy of images of data from these agencies is attached as Exhibit A.)

The FOIL Request

18. On September 7, 2017, Mark Greenblatt, Senior National Investigative Correspondent at Scripps, submitted the FOIL request at issue here to the NYPD. (A true and correct copy of the request is attached as Exhibit B.) The request seeks:

[A]n electronic copy of data for individual Part I offenses reported or known to police from 2014-16, as compiled for purposes of participating in the FBI's national Uniform Crime Reporting (UCR) system and other incident tracking purposes.

19. For each reported Part I offense, the FOIL request seeks specific data fields, including the nature and date of the offense, whether the offense report was unfounded, and whether the offense was cleared (including, if applicable, the specific type of clearance). The request states expressly, and in bold text, the following: "This

request is asking for a copy of the underlying , incident-level data that is regularly accessed and used to compile statistical reports for purposes of complying with the requirements of the UCR program.” *Id.* at 1.

20. In a letter dated September 14, 2017, Lieutenant Richard Mantellino of the NYPD acknowledged receipt of Scripps’ FOIL request. (A true and correct copy of that letter is attached as Exhibit C.) Lieutenant Mantellino noted that “further review” of the request was “necessary to assess the potential applicability of exemptions set forth in FOIL, and whether the records can be located.” *Id.* He estimated that “ninety business days” were required to conduct that review and respond to the FOIL request. *Id.*

21. That same day, Mr. Greenblatt wrote back to Lieutenant Mantellino seeking an explanation for the unusual and lengthy delay required to respond to Scripps’ request. (A true and correct copy of that e-mail message is attached as Exhibit D.) As Mr. Greenblatt noted, the NYPD’s proposed timeframe for responding to the request was well beyond what FOIL generally permits. *See id.* at 1; Pub. Off. Law § 89(3)(a) (agency shall grant, deny, or acknowledge a request within five business days of the request; if agency cannot disclose records within twenty business days, it shall state in writing “both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part”). In describing the records sought, Mr. Greenblatt reiterated that Scripps is “simply asking for the underlying individualized electronic data records NYPD access to compile and count up the specific categories of information about offenses reported that fall into the FBI’s Part I definition.” Ex. D at 2. He also offered – as he would multiple times later – to arrange a phone call with the NYPD to

discuss the matter, *id.*, and sent additional similar e-mails to the NYPD on October 12, 2017, and January 5, 2018. (True and correct copies of those e-mails are attached as Exhibits E and F, respectively.) The NYPD never responded directly to those e-mails.

22. In a letter dated January 9, 2018, Lieutenant Mantellino denied Scripps' request. (A true and correct copy of that letter is attached as Exhibit G.) His response to the request was as follows: "In regard to the records which you requested, not all are maintained in the manner, but certain elements can be extracted from the NYC Open Data Site at: https://data.cityofnewyork.us/browse?Dataset-Information_Agency=Police+Department+%28NYPD%29&provenance=official."

23. Because the NYC Open Data Site does not contain the detailed information sought by the FOIL request, Mr. Greenblatt submitted an administrative appeal of the denial on Scripps' behalf on January 12, 2018. (A true and correct copy of the administrative appeal is attached as Exhibit H.) He noted that the NYPD did not claim to not have the records sought, did not cite an exemption permitting the withholding of those records, and did not claim that producing the records posed an undue burden or was beyond its technical abilities. *Id.* Mr. Greenblatt also stated again, in clear terms, the records targeted by the request:

The FBI UCR rules require participating agencies to report the number of cases it determines are "unfounded", and it also allows for agencies to count an offense as cleared if the offense led to an arrest or if it was "exceptionally cleared". None of this level of detail appears to be available at the web link the NYPD sent Scripps. It is our belief that NYPD both maintains this information and regularly accesses the raw data we are requesting now—as a part of the process the NYPD engages in as it regularly participates in the UCR program and it reports aggregate offense, unfounded, and clearance counts and statistics required by external UCR authorities.

Id. at 2.

24. After Scripps submitted its administrative appeal, Mr. Greenblatt and Sergeant Jordan Mazur, the NYPD's Records Access Appeals Officer, exchanged several e-mails. (A true and correct copy of the correspondence is attached as Exhibit I.) On the morning of January 30, 2018, Sergeant Mazur informed Mr. Greenblatt that he would not release clearance rates. *Id.* at 8-9. He explained that because New York City Council was currently debating a bill that would require the NYPD to publicly disclose that information, the NYPD "has taken a position to continue to not release these figures so as not to undermine the pending legislation." *Id.* at 8. He cited no provision of FOIL that would allow withholding in such circumstances, and Mr. Greenblatt objected to of the NYPD's refusal to disclose that information. *Id.* Later that same day – which was one day after the statutory deadline to respond – Sergeant Mazur sent Mr. Greenblatt a letter denying the NYPD's administrative appeal. (A true and correct copy of that letter is attached as Exhibit J.) The letter stated, in relevant part:

The appeal is denied because the requested records are not records maintained by the NYPD. Your request is for, "a copy of the underlying, incident-level data that is regularly accessed and used to compile statistical reports"; however, because the NYPD does not participate in the FBI National Incident Based Reporting System, the Department does not maintain this data. Rather, the Department only maintains summary level data pursuant to its participation in the Summary UCR Program.

Id. at 1.

25. After receiving the denial, Mr. Greenblatt wrote to Sergeant Mazur, clarifying – again – the scope of Scripps' request. Ex. I at 3-5. He noted that Scripps understands that the NYPD does not participate in NIBRS, and is therefore not seeking incident-level data that the NYPD submits to the FBI. *Id.* at 3. Rather, Scripps is seeking "the raw data the NYPD possesses that it uses/used to create whatever UCR reports it

eventually files/filed.” *Id.* In response, Sergeant Mazur stated that the NYPD had misunderstood the nature of Scripps’ request. *Id.* at 2-3. Nonetheless, he explained that the NYPD would not produce the records requested, because doing so would require “herculean efforts” to review each reported offense in the years 2014 through 2016, and determine whether any exemptions would justify withholding or redaction of the information. *Id.* at 2-3.

26. Subsequently, the undersigned counsel for Scripps and Sergeant Mazur exchanged correspondence regarding Scripps’ FOIL request. (A true and correct copy of that correspondence is attached as Exhibit K.) Sergeant Mazur initially reiterated his statement in the denial of the administrative appeal that “the requested records are not records maintained by the NYPD.” *Id.* at 7. The undersigned sought greater explanation for the denial, noting that any confusion about the nature of Scripps’ request had since been resolved. *Id.* at 6. The undersigned also conveyed in a telephone conversation that Scripps disclaimed any desire for identifying information – such as the names and telephone numbers associated with reports of crimes – thereby negating potential application of any exemptions and obviating the need for close review or redaction of the records.

27. In response, Sergeant Mazur did not deny the existence of the records. He did not cite the bill pending before New York City Council (which, as it turns out, had already been passed, *see* Ex. I at 5-6), he did not claim that production of the records would require “herculean efforts” on the NYPD’s part, and he did not cite any FOIL exemption that would allow for withholding. Rather, he stated that the records could not be produced based on what he had been told by the Operations Research Section (“ORS”)

of the NYPD. Ex. K at 4-5. The gist of the ORS's statement, which Sergeant Mazur forwarded to Scripps, was that the NYPD could not provide the incident-level data *as it existed* when the agency submitted its UCR report to the FBI. *Id.* That was because some reported offenses had been reclassified since the UCR reports were submitted, and the NYPD does not maintain incident-level data in a static form. *Id.* In other words, the ORS did not deny that it had the ability to produce underlying, incident-level data for reported crimes in the years 2014 through 2016; it noted merely that it could not produce the exact same data it had when it generated its UCR reports to the FBI. The undersigned did not dispute that fact, and stated that Scripps would accept the data the NYPD currently possesses with this caveat. *Id.* at 2. At that point, Sergeant Mazur declined to provide the records or otherwise help Scripps; he noted simply, "there is nothing more that I can do to assist here." *Id.* at 1. There has since been no communication between Scripps and the NYPD.

28. The NYPD has never asserted statutory exemptions that justify withholding the records sought. Any claim that producing those records poses an undue burden or is beyond its technical abilities is not credible. Indeed, the type of records sought here have been provided – again without delay or substantial cost – by over forty law enforcement agencies in the country, including major metropolitan police departments such as those of Chicago and Los Angeles, and including agencies that participate in SRS.

29. Scripps has exhausted its administrative remedies.

CLAIM FOR RELIEF

30. Petitioner hereby repeats and realleges paragraphs 1 through 29 as if fully set forth herein.

31. CPLR Article 78 is the proper vehicle for review of agency decisions regarding FOIL requests, as provided by Public Officers Law § 89(4)(b).

32. Under FOIL, all documents held by governmental entities, such as the NYPD, are presumed open for public inspection and copying. A court reviewing an agency's failure to disclose requested records owes no deference to the agency's decision; rather, the agency bears the burden of showing that the records fall squarely within a specific statutory exemption to disclosure. Documents may be withheld from public inspection only if expressly permitted by such an exemption, and all exemptions are to be construed narrowly. When records contain both exempt and non-exempt information, an agency must typically redact the exempt information from the records instead of withholding the records entirely.

33. In responding to Petitioner's request, Respondents have failed to assert any statutory exemptions that justify withholding the information requested.

34. In responding to Petitioner's request, Respondents have failed to segregate exempt material from non-exempt material, and to satisfy its legal obligation to provide redacted copies of documents with only exempt material withheld.

35. In responding to Petitioner's request, Respondents have failed to provide a specific and particularized justifications for withholding the requested documents.

36. Respondents' actions have caused, and continue to cause, immediate and irreparable harm to the rights guaranteed to Petitioner and to the public at large under FOIL and Article 1, Section 8 of the New York State Constitution.

37. The information requested is of significant interest to the general public.

38. Petitioner has exhausted its administrative remedies and has not obtained the requested records in full.

39. As a result of the foregoing, Respondents have violated FOIL.

40. Petitioner has no adequate remedy other than this proceeding, and no previous application for the relief requested herein has been made to the court.

WHEREFORE, Petitioner respectfully requests this Court to grant judgment:

- (a) Declaring that Respondents have acted unlawfully in withholding from Petitioner documents or portions of documents that are not properly exempt from disclosure under FOIL;
- (b) Vacating, overruling and prohibiting the enforcement of the final administrative decision, dated January 30, 2018;
- (c) Directing Respondents to provide Petitioner with immediate access to the records specified in its FOIL request;
- (d) Awarding Petitioner its costs and attorneys' fees pursuant to Public Officers Law § 89(4)(c); and
- (e) Awarding Petitioner such other and further relief as the Court deems just and proper.

Dated: New York, New York
May 30, 2018

Respectfully submitted,
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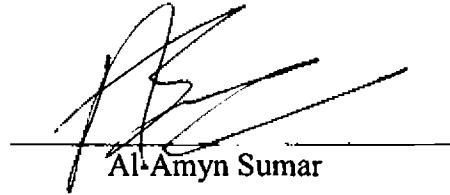
Attorneys for Petitioner The E.W. Scripps Company

ATTORNEY VERIFICATION

STATE OF NEW YORK)
)
) SS.:
COUNTY OF NEW YORK)

AL-AMYN SUMAR, being duly sworn, deposes and says:

1. I am an associate with the law firm Ballard Spahr LLP, counsel for Petitioner The E.W. Scripps Company in this action.
2. I have reviewed the foregoing Petition and know the contents thereof to be true based on my own knowledge or based on my information and belief upon consultation with The E.W. Scripps Company and its agents or employees.
3. The reason this verification is not made by an agent or employee of Petitioner as to all matters not stated upon personal knowledge is that Petitioner is not located within the county where this attorney maintains his office.



Al-Amyn Sumar

Sworn to before me this
30th day of May, 2018



Lisamarie Appel
Notary Public

LISAMARIE APPEL
Notary Public, State of New York
No. 01AP4869703
Qualified in Richmond County
Certificate Filed in New York County
Commission Expires Sept. 2, 2018